SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 487

THE AMERICANA CORPORATION, a corporation,

Petitioner,

vs.

EDWARD A. HABER, ROBERT H. MOEN, RONALD P. TAMILLO, JOHN WINNING, and ROBERT SISSON,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Americana Corporation, a corporation, defendant and counterclaimant in the District Court, prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, rendered on May 15, 1967, reversing a judgment of the United States District Court for the Central District of California, holding that certain designated employees were exempt from the provisions of the Fair Labor Standards Act under 29 U.S.C. Section 213(a)(1).

The Opinion of the Court Below.

No written opinion was filed by the District Court in connection with any phase of the litigation. The opinion of the Court of Appeals is not yet reported. A copy of the Opinion of the Court of Appeals is appended to this Petition for Writ of Certiorari as Appendix "A".

Jurisdiction.

Jurisdiction for review of this case upon a Writ of Certiorari is conferred upon this Court under 28 U.S.C. 1254, Sub. 1.

The Opinion of the Court of Appeals for the Ninth Circuit was filed May 15, 1967.

Questions Presented.

The question presented broadly involves a new and novel interpretation of the exclusion from the time and one-half provisions of the Fair Labor Standards Act of ". . . any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined . . . (by regulations of the Secretary,) . . .) . . ." [29 U.S.C. 213(a)(1)], and a new and novel interpretation and application of the regulation by which the Secretary has so defined the term "administrative capacity" [29 C.F.R. 541.2].

Respondents were employed as Area Supervisors in petitioner's credit and collection department. The exhaustive proofs concerning the duties of respondents are set forth in the Statement of the Case. Among other things, each respondent was compensated for his services on a salary basis during the period in question "at a rate of not less than $125.00 per week (exclusive

of board, lodging or other facilities),"* and each respondent was eligible to qualify under the proviso of 29 C.F.R. Sec. 541.2 *as it existed during the periods of employment in question*; the regulation was amended prior to trial raising $125.00 to $150.00 and in other respects. The Circuit Court of Appeals reversed the District Court's finding that respondents were employed in a bona fide administrative capacity, on the sole ground that respondents did not meet one of the five criteria (which in the aggregate comprise an alternate test to the proviso), specifically 29 C.F.R. 541.2 (d), because, according to the testimony of each respondent, he spent more than 20% of his time in "non-administrative" functions. There are conceptually only two ways this result could only have been achieved:

1. By requiring respondents to qualify under the proviso contained in 29 C.F.R. 541.2 as it existed AT THE TIME OF TRIAL and not as it existed DURING THE PERIODS OF EMPLOYMENT in question; or

2. By adding to the requirements set forth in the proviso (to be met as an alternative to meeting the requirements set forth in 29 C.F.R. 541.2, subsections (a) through (e)), the requirement set forth in 29 C.F.R. 541.2(d).

Accordingly, the first two questions presented are:

FIRST: Is the status of an employee as an administrative employee to be determined according to the definition set forth by the Secretary pursuant to express authority from Congress which is in force during the

*But not, in general, "at a rate of not less than $150 per week, etc" (excluding bonuses).

period of employment in question, or according to a redefinition in force at the time of trial, the effective date of which was subsequent to the termination of employment of the administrative employee, or, stated differently, are administrative regulations testing conduct to be applied retroactively?

SECOND: May the proviso contained in 29 C.F.R. 541.2 be judicially amended to read as follows by the addition of the italicized language:

> "Provided, that an employee who is compensated on a salary or fee basis at a rate not less than $125.00 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section, *except the requirements of subsection (d) of this section.*"

The District Court determined as a conclusion of law respondents were employed in a bona fide administrative capacity within the meaning of 29 U.S.C. 213 (a)(1). The District Court further made findings of fact with respect to each requirement set forth in 29 C.F.R. 541.2, Subsections (a), (b), (c), (d) and (e). Without regard to whether the respondents were entitled to qualify under the plain terms of the proviso, three further important questions are presented, in connection with the reviewing court's interpretation and application of 29 C.F.R. 541.2 (d) which provides the

employee may not devote more than 20% of his hours worked in the work week to activities which are not "directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; . . ." The Circuit Court of Appeals applied a test of whether "more than 20% of the employee's time be spent in nonadministrative work." Accordingly, the next question presented is:

THIRD: In computing the percentage of non-exempt hours under 29 C.F.R. 541.2 (d) worked by an employee, is the correct test one of time spent in "non-administrative work" or hours which are not "directly and closely related" to the employee's administrative work?

In the 2000 page Reporter's Transcript of the proceedings in the District Court, the evidence on the question of the duties and responsibilities of respondents was conflicting, consisting on the one hand of petitioner's evidence as to the duties of respondents, and, on the other, of respondents description of their respective duties, including evaluation and characterization of duties. The Circuit Court of Appeals reversed the District Court on the sole ground as aforesaid because:

> "Appellant Haber testified that about 60% of his time was spent in the non-administrative function of collecting accounts [Rep. Tr. p. 51], Ronald Tamillo estimated about 80% of his time was spent on telephone collections or dealing with merchandise. [Rep. Tr. p. 589], Winning estimated that 50% of his time was spent as a telephone collector, [Rep. Tr. p. 159]."

Accordingly the following questions are presented:

FOURTH: May a Circuit Court of Appeals reject findings of a District Court and choose conflicting testimony as controlling?

FIFTH: Is a person claiming benefits under the Fair Labor Standards Act the proper person to determine the nature or characterization of his duties, or does this invade the province of the trier of fact?

Constitutional Provisions, Statutes and Regulations Involved.

The Constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Federal statute involved is the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended (29 U.S.C. 201 *et seq.*), and particularly section 13 thereof, 29 U.S.C. 213(a)(1).

The Federal regulations involved are 29 C.F.R. Sec. 541.2 as it existed from revision, January 1, 1961 to revision January 1, 1964 printed as Appendix "B", and 29 C.F.R. Sec. 541.2, as it existed effective January 1, 1964, printed as Appendix "C".

Statement of the Case.

By an action filed in the United States District Court, respondents, Edward A. Haber, Ronald P. Tamillo, and John Winning sought enforcement of claims for overtime compensation pursuant to 29 U.S.C. 207, 216, for the following periods of employment:

	From	To	Amount
Edward A. Haber	8-14-62	5-15-63	$4,189.15
Ronald P. Tamillo	8-14-62	11-11-63	$8,459.16
John Winning	8-14-62	5-15-63	$4,433.00

[Clk. Tr. pp. 210, 211, 212].

Three other cases were filed against Americana seeking recovery for overtime compensation. Americana answered and filed a counterclaim seeking recovery for thefts from the company. The four cases were consolidated for trial. From judgments for Americana on the complaints and cross-complaints the various plaintiffs appealed.

The United States Circuit Court reversed and remanded certain portions of the cases for retrial. It is from the holding of the United States Circuit Court that the employees Edward A. Haber, Ronald P. Tamillo and John Winning were not exempt employees within the meaning of 29 U.S.C. Sections 206, 207, that this Petition is directed. Petitioner does not seek review of the decision of the Circuit Court on the *Sisson v. Americana, Seidenberg v. Americana,* or *Kalmus v. Americana* portions of the decisions. Nor does it seek review of the holding applicable to Robert Moen in the case of *Haber, et al. v. Americana.*

Petitioner Americana Corporation employed respondents in its Beverly Hills Office, in the credit and collection department [Clk. Tr. pp. 5, 6, 7, 10, 14, 15, 16; Rep. Tr. pp. 32, 36, 140, 228, 582, 775, 790, 911, 956], as "Area Supervisors". Appellant is the publisher of the Encyclopedia Americana and related works, and maintains two separate office staffs, one for sales and the other for credit and collections. The credit and collection section is made up of a Collection Manager, Assistant Collection Manager, Area Supervisors, telephone collectors, and billing and correspondence girls [Rep. Tr. pp. 263, 264].

The duties of the telephone collectors were to telephone accounts and collect money [Rep. Tr. pp. 810,

924, 959]. They could not discharge or "write off" an account [Rep. Tr. p. 935], forgive a debt or terminate a contract [Rep. Tr. p. 810], verify or check credit on new accounts or orders [Rep. Tr. pp. 925, 990], or instruct any other employees. No other employees worked under them [Rep. Tr. p. 961], and they never assigned work to other employees [Rep. Tr. pp. 810, 961]. They were instructed to sign in and out when arriving and leaving work [Rep. Tr. pp. 924, 976, 1013, 1112]. Work was assigned to them by their "Area Supervisors" [Rep. Tr. pp. 810, 960, 986, 988, 991, 999, 1080, 1093]. While their supervisors discussed accounts with them [Rep. Tr. p. 1008], they never made any independent decision on any account [Rep. Tr. p. 1011]. Collectors working outside of the office reported into their Area Supervisor concerning problems in their area and were advised as to how to handle them [Rep. Tr. p. 82]. The salary of the telephone men ranged from $400.00 per month [Rep. Tr. pp. 822, 912, 1129], to the maximum of $500.00 [Rep. Tr. pp. 822, 959]. They were given $50.00 incentive bonuses on occasion [Rep. Tr. pp. 847, 912], which bonuses were dependent upon the collection activities of the area.

In the office structure, the Area Supervisors, five in number [Rep. Tr. p. 263] had certain geographical areas assigned to them. Working under the Area Supervisors were the telephone collectors and the various billing and correspondence girls [Rep. Tr. p. 266]. The duties of the Area Supervisors were to enforce and put into practice, the policies and procedures handed down by the company [Rep. Tr. p. 264], and it was up to them how to carry it out [Rep. Tr. pp. 102,

117, 264]. They were expected to use a "great deal of discretion and exercise a lot of judgment" in their work [Rep. Tr. pp. 117, 264]. They conferred with both Mr. T. C. May, President of the Company, the Resident Manager, and the Collection Manager in the enforcement and practice of the company procedures and policies. The Supervisors could forgive a debt owing to the company [Rep. Tr. pp. 265, 1078], accept partial payments [Rep. Tr. pp. 158, 183] and extend contracts. They directed the activities of the telephone men [Rep. Tr. p. 266], allocated and directed the girls in their area in correspondence and billing work [Rep. Tr. pp. 82, 204, 205, 266]. The supervisors guided the girls in their duties, assigned work, criticized or praised work and saw that the work was properly done [Rep. Tr. p. 267]. In addition, the Area Supervisors had the responsibility of assignment of accounts to the telephone men [Rep. Tr. pp. 76, 80, 193, 269, 1074] apportionment of work among the telephone men [Rep. Tr. pp. 82, 163, 269, 1075] interviewed and employed new people for the company [Rep. Tr. pp. 162, 190, 194, 272] recommended discharge or transfer of employees [Rep. Tr. p. 78] which recommendations were followed to a great extent [Rep. Tr. p. 272]. As part of the performance of the duties as Area Supervisors, they reported to the Collection Manager on activities in their areas [Rep. Tr. p. 89]. Recommendations were made by them as to how to handle the collection problems which arose [Rep. Tr. pp. 116, 202]. In the exercise of their discretion, they could decide on the approach to the collection of accounts and the verification of contracts [Rep. Tr. p. 117], in that they could accept partial payments on accounts

[Rep. Tr. pp. 158, 183], and extend time for payment of accounts [Rep. Tr. p. 183]. In determining whether credit should be extended, they considered the occupation, length of employment, dependents, and other credit references in selecting an alternative to follow [Rep. Tr. p. 186]. Their decisions on these matters were final [Rep. Tr. p. 187]. The recommendations made to the company by the Area Supervisors concerning credit acceptable or rejection were followed [Rep. Tr. pp. 52, 54, 82, 160]. The Area Supervisors collected information for the Collection Report to be given to the company, and turned the information over to an employee who compiled the reports [Rep. Tr. p. 701]. The Area Supervisors had direct and continuous responsibility over some $15,000,000.00 in accounts receivable directly related to the general business operations of the company. They were constantly available and their responsibilities and discretion were of a full time continuous nature. They were not required to sign in and out on time sheets as were the telephone men and the billing and accounting girls. The duties of all Area Supervisors were substantially the same [Rep. Tr. p. 1100].

They were paid $500.00 to $700.00 per month and were given a Christmas bonus of $1,500.00 [Rep. Tr. p. 275]. During the period in question, each respondent had a base and guaranteed salary of or in excess of $600.00 per month, paid semi-monthly on the first and fifteenth [Clk. Tr. pp. 144, 145, 165, 205, 206 and 208].

Edward Haber, who was designated an Area Supervisor, attended general meetings [Rep. Tr. p. 61], interviewed employees [Rep. Tr. p. 74], make recommendations as to employment and discussed rates of

pay [Rep. Tr. p. 75]. He allocated accounts to collectors in his area [Rep. Tr. pp. 76, 80] reviewed their work [Rep. Tr. p. 77], reported to management on their work, discussed pay increases with telephone collectors [Rep. Tr. p. 77] recommended transfers and termination of employees which were followed [Rep. Tr. p. 78], took reports of outside collections in his area and coordinated outside work with inside work in his area [Rep. Tr. p. 96]. He could use his own discretion and judgment in carrying out the orders and duties given to him by the Collection Manager [Rep. Tr. p. 102]. There were seven employees in his area. He attended meetings where collection policies and approach were discussed, made recommendations which were generally followed [Rep. Tr. pp. 116, 117, 120]. He personally cancelled amounts of monies owing to the company [Rep. Tr. p. 1110] without merchandise the merchandise being returned to the company. He received general instructions from the Collection Manager, and was left to his own discretion and judgment as to how to carry out company policy.

John Winning, another designated Area Supervisor, was instructed by the Collection Manager on his duties [Rep. Tr. p. 148] which were substantially the same as other supervisors [Rep. Tr. p. 1100]. He could accept partial payments on accounts [Rep. Tr. p. 158], did some credit checking and passed on orders [Rep. Tr. p. 160], directed the telephone collectors in their work, and the girls working in his area [Rep. Tr. pp. 193, 1080], could cancel accounts [Rep. Tr. pp. 1078, 1079]. He interviewed new employees and discussed salaries, raises and profit sharing plans with them [Rep. Tr. pp. 191, 1072, 1073]. After new employees

were hired, he explained their duties and allocated their work [Rep. Tr. p. 1074]. Mr. Winning checked the work of the telephone collectors [Rep. Tr. p. 1075], and solved any problems taken to him by the collectors [Rep. Tr. p. 1075]. In checking on new contracts, Mr. Winning would consider the occupation, length of employment, residence, age and dependents of the prospective purchaser, and accepted or rejected the credit [Rep. Tr. pp. 174, 175, 179]. In the collection of accounts in his area, and in working with the telephone collectors, Mr. Winning could extend the time for payment, determine the truthfulness of the statements, inquire into debts, accept partial payments, and select whichever alternative to follow in the collection of the account [Rep. Tr. pp. 183, 186, 193]. His decisions on these matters were final [Rep. Tr. p. 187]. The out of town collectors who worked his area reported directly to him [Rep. Tr. p. 188]. His area handled from 15,000 to 17,000 accounts [Rep. Tr. p. 193].

During his employment as Area Supervisor, he conferred with the Collection Manager about hiring [Rep. Tr. p. 194], made suggestions to management as to how the work could be facilitated [Rep. Tr. p. 202], and worked closely with the Collection Manager [Rep. Tr. p. 206]. He earned $9,550.00 in the year 1962, and from January to May of 1963, $3,400.00. He was given a $1,500.00 Christmas bonus during his employment.

Ronald Tamillo first worked for petitioner in 1957 as a telephone collector [Rep. Tr. p. 582]. In August of 1962, he was designated an Area Supervisor, at the rate of $600.00 per month. Since he had a good background in collections and investigations [Rep. Tr. p.

581], he handled "intricate problems which took considerable experience" [Rep. Tr. pp. 626, 627]. He was asked to go to Mexico by the President of the Company, T. C. May, to reduce the delinquencies, and to look for "holes to plug up" in the collection efforts [Rep. Tr. p. 628]. During the time in Mexico, he negotiated contracts between union officials, the Mexican Government and Americana for the purchase and sale of books in the oil refineries [Rep. Tr. pp. 633, 696] and helped with the preparation of agreements for the Mexican business [Rep. Tr. p. 633]. He reported directly to Mr. May. In August of 1962, he returned to Los Angeles, and in September of 1962, he was sent to Hawaii to straighten out that office [Rep. Tr. p. 634]. He reviewed the delinquent accounts before leaving for Hawaii [Rep. Tr. p. 637], handled the Better Business Bureau complaints while there [Rep. Tr. p. 637], interviewed people for employment in Hawaii, rated applicants, recommended salaries, and evaluated the Hawaiian accounts, working with the Hawaiian collectors [Rep. Tr. p. 649]. He reported to T. C. May, the President of Americana, and to Carolyn Allison, the President Manager [Rep. Tr. pp. 646, 655, 657]. He returned to Los Angeles, and then was sent to Hawaii in May of 1963 [Rep. Tr. p. 654], doing the same work and activities [Rep. Tr. p. 656]. While he was in Hawaii, the Resident Manager asked to have him sent to Chicago to report and solve the delinquency problems in that office [Rep. Tr. pp. 658, 661]. He was brought to Chicago for this purpose and reported to Mrs. Allison, after reviewing the collection reports, to determine where the delinquency was arising [Rep. Tr. p. 672]. From Chicago, Mr. Tamillo

was sent to Washington D.C. office, and from there to Puerto Rico to look over the delinquency problem and to solve it [Rep. Tr. p. 687]. While in Washington, D.C. office, he discussed the collection problems in the United States with the Chairman of the Board, the Resident Vice-President of the Washington, D.C. office, and was instructed in his efforts to "stem the tide" of delinquency by the Resident Vice President, Vincent Sutliff, Jr. [Rep. Tr. p. 596] and Mrs. Allison, the Executive Vice President of petitioner [Rep. Tr. p. 595]. Another man had been sent from Canada to help on the problems [Rep. Tr. p. 598]. The instructions were given that there was an extreme delinquency problem and to "get it down" [Rep. Tr. p. 597], both in Washington, D.C., and Puerto Rico. Upon his return from Puerto Rico, he was sent on a collection trip by the Washington, D.C. office to again determine the cause of delinquent accounts and correct them. He reported directly to the Executive Vice-President, the Resident Vice-President of the Washington, D.C., office and the Chairman of the Board.

Prior to his specialized trips on collections, Mr. Tamillo was employed as an Area Supervisor in the Beverly Hills, California, office, directing telephone collectors on their accounts [Rep. Tr. pp. 985, 986] assigned accounts to telephone collectors [Rep. Tr. p. 991]. He supervised three or four collectors, by giving them their work, telling them what to do, who to call and what to handle [Rep. Tr. p. 1051]. He cancelled accounts owed to the company [Rep. Tr. pp. 1034, 1057], handled Better Business Bureau complaints, dictated letters to his secretary [Rep. Tr. p. 1030], told her what work to do, supervised her work [Rep. Tr.

pp. 1031, 1042, 1049]. Mr. Tamillo handled all of the calls directed to the Collection Supervisor [Rep. Tr. p. 1052]. He was compensated at the rate of $600.00 per month plus expenses in 1962, $650.00 per month in 1963, plus expenses, and raised to $750.00 per month in November, 1963, plus his expenses. Expenses during his travels averaged $250.00 per month.

REASONS FOR GRANTING CERTIORARI.

A. First and Second Questions.

Is the status of an employee as an administrative employee to be determined according to the definition set forth by the Secretary pursuant to express authority from Congress which is in force during the period of employment in question, or according to a redefinition in force at the time of trial, the effective date of which was subsequent to the termination of employment of the administrative employee, or, stated differently, are administrative regulations testing conduct to be applied retroactively?

May the proviso contained in 29 C.F.R. 541.2 be judicially amended to read as set forth in Questions Presented, SECOND, of this Petition for Writ of Certiorari, by the addition of the language there underscored?

Although the district court did not expressly find that respondents qualified as administrative employees under the requirements of the *proviso* contained in 29 C.F.R. 541.2, as well as under the alternative five-part test set forth therein, the district court must be upheld

even if in reaching a correct conclusion it gives the wrong reason.

Levinson v. Spector Motor Serv. (1935), 59 N.E. 2d 817, 389 Ill. 466, aff'd 330 U.S. 649.

Respondents did qualify under the proviso as it existed during the periods of employment in question (See Appendix B). Effective January 1, 1964, the proviso was amended raising the $125.00 requirement to $150.00 and in other respects (See Appendix C).

The Circuit Court of Appeals reversed the district court's finding that respondents were employed in a bona fide administrative capacity on the sole ground that respondents did not meet one of the five criteria which in the aggregate comprise an alternative test to the proviso; specifically, that respondents did not meet the requirements of 29 C.F.R. 541.2(d).

This result can only be reached either by applying retroactively the provisions of the provisions of the proviso as it existed from January 1, 1964 and at the time of trial, or by appending to the requirements which must be met to qualify under the proviso, the requirements of 29 C.F.R. 541.2(d), in either of which events the application of the regulations is new, novel, and conflicts in substance with the application of the regulations by other districts and by this court, as set forth below. Throughout this country business engaged in interstate commerce look to and rely on the regulations promulgated by the Secretary of Labor in the efficient conduct of their affairs. The regulations are meticulous and admit only of interpretation by the court, not of outright change of retroactive application.

1. First Question.

The regulation at the time of the trial may be applicable in an action by the Secretary of Labor to enjoin a violation of the provisions of the Fair Labor Standards Act.

Wirtz v. Mississippi Publishers Corp., 364 F. 2d 603 (1966) [By necessary implication]

but in all actions the appropriate regulation governing conduct in failing to pay overtime for a *certain period* must be the regulation in effect *during that period.*

Wirtz v. First State Abstract Ins. Co., 362 F. 2d 83 (1966) [By necessary implication].

The regulations promulgated by the Secretary of Labor pursuant to express sanction of Congress have the force of law.

Helwell v. Haberman, 140 F. 2d 833 (1944).

A statute is generally enacted to take effect from a time anterior to its passage; even assuming Congress intended the regulations to be applied retroactively, if a statute has a retroactive or retrospective effect which imposes upon a party the burden of proving a fact at the time of trial as a necessary element of his cause of action or defense, not requisite under the law as it stood prior to the enactment of the statute and at the time his cause of action or defense arose, the enactment denies the party due process and is unconstitutional as retroactive.

United States ex rel. Feuer v. Day, C.C.A. N.Y., 42 F. 2d 127.

2. Second Question.

The Secretary intended his definition of an employee employed in a bona fide administrative capacity to be an alternative test, whereunder the employee may be so classified if he meets the criteria of subsections (a) through (e) of 29 C.F.R. 541.2, *or,* in the alternative the requirements of the proviso.

In Subpart B—Interpretations, Regulation 541.213 it is explained:

> "Such a highly paid employee is deemed to meet all of the requirements in Sec. 541.2(a) through (e). If an employee qualified for exemption under this proviso, it is not necessary to test his qualifications in detail under Sec. 541.2(a) through (e)." 29 C.F.R. 541.213 (Italics supplied).

B. Third Question.

In computing the percentage of non-exempt hours under 29 C.F.R. 541.2(d) worked by an employee, is the correct test one of time spent in "nonadministrative work" or hours which are not "directly and closely related to the employees' administrative work?

With regard to the reason the Circuit Court of Appeals reversed the district court's determination the employees met the criteria set forth in 29 C.F.R. 541.2, subsections (a) through (e), the Circuit Court of Appeals set forth a test of characterizing non-exempt hours as time spent in "nonadministrative work". The particular requirement, 29 C.F.R. 541.2(d) sets forth a test of classifying non-exempt hours as hours in the workweek devoted ". . . to activities which are not directly and closely related to the performance of the work

described in Paragraphs (a) through (c) of this section."

The interpretative regulations make it clear there are three, not two categories of work to be considered:

> "§ 541.202 Categories of work.
>
> (a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition:[7] (1) The work specifically described in paragraphs (a), (b), and (c) of § 541.2; (2) routine work[8] which is directly and closely related to the performance of the work which is described in paragraphs (a), (b), and (c) of § 541.2; and (3) routine work which is not related or is only remotely related to the administrative duties." 29 C.F.R. 541.202.

The Circuit Court of Appeals assumed that Respondents' executive functions were their respective administrative functions, and that their respective administrative functions were non-administrative functions. In other words, the court assumed that "collecting" in the manner it was practiced by these employees was a non-exempt or nonadministrative function.

The Circuit Court of Appeals did not even consider or analyze the clear feeling of the district court that the business activity of collecting delinquent accounts *as it was practiced by these Respondents,* in outstanding contradistinction to "collecting" as it was practiced by their subordinates, the telephone collectors, was work performed in an administrative capacity, and that the broad executive functions of the Respondents were in addition thereto.

Although the terms "executive" and "administrative" are intended to establish two distinct categories of exempted employees, they are somewhat synonymous, and of necessity classifications established thereby do overlap.

Walling v. Armour & Co. (D.C. Kan., 1947), 13 Labor Cases ¶ 63,883.

During a workweek an employee who performs functions exempted under two classifications, is exempt as a combination administrative and [professional] employee, provided he does not perform more non-exempt work than allowable.

McComb v. Eimco Corp. (D.C. Utah, 1949), 16 Labor Cases ¶ 65,107, 83 F. Supp. 635.

An employee who fails to qualify for an executive exemption because he spends more than maximum time allowed at nonexempt work, may qualify for administrative exemption where such work qualifies for administrative exemption in that it is related to his administrative duties.

Sparks v. Pederson (D.C. Conn., 1949), 17 Labor Cases ¶ 65,327.

W & H Opinion Letter, April 7, 1941.

The peremptory application of a static and incorrect test by the Circuit Court of Appeals, and the failure to analyze the functions performed by Respondents in terms indicated by the Regulations to be appropriate, is a new approach to the complicated, and often subtle, analysis of facts found in reported decisions concerning this recurring question of capacity. The problem of classifying an employee is a serious one and industry

should be able to rely on the Regulations and Bulletins of the Secretary of Labor in assigning executive and administrative duties. Petitioner respectfully submits that the test applied by the Circuit Court of Appeals raises an important question concerning interpretation of the Fair Labor Standards Act which may in the future affect all industries engaged in interstate commerce.

C. Fourth and Fifth Questions.

May the Circuit Court of Appeals reject findings of a District Court and choose conflicting testimony as controlling?

Is a person claiming benefits under the Fair Labor Standards Act the proper person to determine the nature or characterization of his duties, or does this invade the province of the trier of fact?

The determination of the bona fide administrative capacity of an employee under the Fair Labor Standards Act is a question of fact.

McComb v. Utica Knitting Co. (CA 2 1947), 13 Labor Cases ¶ 64,137, 164 F. 2d 670.

In choosing the conflicting testimony of respondents to reverse the district court, the Circuit Court of Appeals has set itself in conflict with the decisions of this court and the decisions of other districts, holding that bona fide executive or administrative capacity is a question of fact, and with well established principles respecting the function of the trier of fact. For this additional reason, taken together with the questions analyzed above, Petitioner urges that the Circuit Court

of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervision.

In interpreting the regulation, a Circuit Court of Appeals may not reject the findings of a district court because of conflicting testimony. The district court who hears the witnesses is the proper judge of their credibility.

Walling v. General Industries Co., 330 U.S. 545.

In addition to the evidence before the Court, the judge was entitled to draw an inference of administrative status from the compensation of the respondents. In 1962, respondent Tamillo's total compensation (including bonuses) was $10,724.75, and respondents Haber and Winning's total compensation for said period was $9,550.00 each.

Jones v. Bethlehem Fairfield Shipyard (D.C. Md. 1947), 14 Labor Cases ¶ 64,258, 75 F. Supp. 86.

The trial court was entitled to disbelieve, for instance, that respondent Tamillo, who was paid twice the salary of a telephone collector, spent about "eighty percent of his time on telephone collections or dealing with merchandise [Rep. Tr. p. 589], particularly when the evidence adduced by petitioner was to the effect respondent Tamillo was, in fact, engaged in trouble-shooting all over the world. The trial court was entitled to disbelieve, for instance, the testimony of respondent Haber against whom judgment was affirmed for money damages arising out of activities to misappropriate petitioner's property. Examples of the conflicting evidence in the record are too numerous to multiply.

Conclusion.

The problem of classifying an employee as an administrative or executive employee is one which recurs in industry engaged in interstate commerce, and as indicated by the wealth of decisional law, the problem presents complicated and subtle facets. When administrative duties are conferred and a remuneration in excess of the amount set forth in the then effective regulation to qualify under the proviso of 29 C.F.R. 541.2 is paid, a remuneration so handsome as to almost preclude a claim that the employee is not employed in an administrative or executive capacity, then the employer ought not to still be at risk that a Circuit Court of Appeals will overturn the determination of the trier of fact by applying incorrect law and incorrect tests to the duties of Respondents as disclosed by the record. Petitioner respectfully submits that this case will have a serious impact on industry and involves a need for interpretation by this court of the provisions of the Fair Labor Standards Act and the regulations promulgated thereunder by authority of Congress.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

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